

No. 77-475

Supreme Court, U. S.
FILED

JAN 19 1978

MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States
OCTOBER TERM, 1977

ROGER ALSTAIR WILLIAMS FRY, PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE SIXTH CIRCUIT*

BRIEF FOR THE UNITED STATES
IN OPPOSITION

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OPINION BELOW

The order of the court of appeals (Pet. App. A) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on June 27, 1977. A petition for rehearing was denied on August 25, 1977. The petition for a writ of certiorari was not filed until September 26, 1977, and is therefore two days out of time under Rule 22(2) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether Congress acted irrationally in prohibiting the commercial distribution of marijuana.

2. Whether the penalty provisions of 21 U.S.C. 848(c), which apply to both marijuana and heroin distribution, and which exclude the possibility of suspension of sentence, probation, or parole, violate the Due Process or Cruel and Unusual Punishment Clauses as applied to a criminal organization distributing marijuana.

3. Whether petitioner is eligible for parole because the provision under which he was sentenced states only that the provisions of 18 U.S.C. 4202—which formerly governed parole eligibility—shall not apply, and does not reflect the fact that the parole eligibility provisions of Section 4202 have been renumbered as Section 4205.

STATEMENT

On February 5, 1976, a superseding indictment was filed in the United States District Court for the Eastern District of Michigan. The indictment charged that petitioner and others had conspired to distribute marijuana, in violation of 21 U.S.C. 841(a), and that petitioner had conducted a continuing criminal enterprise, in violation of 21 U.S.C. 848 (Pet. 9). Petitioner moved before trial to dismiss the indictment; he contended that the statutory classification of marijuana is unconstitutional and requested an evidentiary hearing. The district court declined to hold a hearing and denied the motion on April 5, 1976.

On July 12, 1976, after his trial had commenced, petitioner pleaded guilty to the continuing criminal enterprise count.¹ The district court sentenced petitioner to ten years' imprisonment and provided, pursuant to 21

U.S.C. 848(c), that the petitioner would not be eligible for parole under 18 U.S.C. 4202 (Pet. 9-10). The court of appeals affirmed (Pet. App. A).²

At the time of his guilty plea, petitioner admitted that he was “[s]upervising manager” of a complex organization that imported “[m]ulti-ton” quantities of marijuana from Mexico in oil tank trucks, that more than five persons were involved in this operation, and that the marijuana had been redistributed throughout the United States (App. 52b-84b).³ According to petitioner, he had made a profit of approximately \$12,000 per ton (*id.* at 69b), and although the operation was not continuous, whenever new supplies of marijuana became available through the Mexican sources, petitioner’s organization worked steadily for two or three month periods (*id.* at 70b-71b). One of petitioner’s distributors, Charles S. Hewett, testified that he paid petitioner approximately \$1,750,000 for 14 tons of marijuana during the first seven months of 1973 alone (*id.* at 36b-37b).

ARGUMENT

1. Federal law establishes five schedules of controlled substances. 21 U.S.C. 812. Congress placed marijuana on Schedule I, which also includes narcotic drugs such as heroin.⁴ Petitioner’s contentions, although presented in

²The court of appeals reached the merits of petitioner’s arguments despite the fact that he had pleaded guilty. But see *United States v. Sepe*, 486 F. 2d 1044 (C.A. 5) (*en banc*).

³“App.” refers to the appendix to the government’s brief in the court of appeals, a copy of which is being lodged with the Clerk of this Court.

⁴Schedule I drugs are characterized by a high potential for abuse, no currently acceptable medical treatment use in the United States, and a lack of safety even under medical supervision. 21 U.S.C. 812(b)(1).

¹A mistrial was declared on the distribution count.

several ways, boil down to the argument that either the Constitution or other statutes require marijuana to be reclassified to Schedule V (Pet. 12).⁵ If it were so reclassified, it would cease to be a drug within the reach of the continuing criminal enterprise statute under which petitioner was convicted. Moreover, other offenses in connection with Schedule V drugs are not felonies. See 21 U.S.C. 841(b)(3).

Petitioner's argument is insubstantial. Congress classified marijuana as a Schedule I drug principally at the suggestion of the Department of Health, Education, and Welfare, which recommended that the strict Schedule I controls were necessary until more was known about the effects of marijuana. See. H.R. Rep. No. 91-1444, 91st Cong., 2d Sess., Part 1, pp. 12-13, 61 (1970). The National Commission on Marihuana and Drug Abuse likewise concluded that, given the present state of knowledge regarding marijuana, strict control is justified; its first annual report states that marijuana "is not an innocuous drug. The clinical findings of impaired psychological function, carefully documented by medical specialists,

legitimately arouse concern." National Commission on Marihuana and Drug Abuse, *Marihuana: A Signal of Misunderstanding* 90 (1972). The medical questions have not yet been resolved. See, e.g., *Sixth Annual Report to the United States Congress From the Secretary of Health, Education and Welfare: Marihuana and Health* (1976).

The evidence before Congress made it rational for the legislature to conclude that marijuana should be controlled strictly, and its placement in Schedule I does not violate the Due Process Clause. See, e.g., *United States v. Gramlich*, 551 F. 2d 1359, 1364 (C.A. 5); *United States v. Kiffer*, 477 F. 2d 349 (C.A. 2), certiorari denied, 414 U.S. 831; *United States v. Rodriguez-Camacho*, 468 F. 2d 1220 (C.A. 9), certiorari denied, 410 U.S. 985. As the court explained in *United States v. Kiffer*, *supra*, 477 F. 2d at 356:

[T]here is a body of scientific opinion that marihuana is subject to serious abuse in some cases, and relatively little is known about its long-term effect. Congress was advised by HEW that determination of the seriousness of these potential hazards would require further study, and in the meantime Congress was certainly not precluded from taking a cautious approach.

Congress' decision is not subject to judicial reassessment, and the fact that some experts disagree with Congress' conclusion does not require a court to hold an evidentiary hearing. Cf. *Whalen v. Roe*, 429 U.S. 589, 597; *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 20-34.⁶

⁵Schedule V includes substances that (1) have a low potential for abuse relative to the substances in Schedule IV; (2) have a currently accepted medical treatment in the United States; and (3) if abused, will lead to limited psychological or physical dependence relative to the substances in Schedule IV. 21 U.S.C. 812(b)(5). The third possible placement for marijuana is Schedule II. Schedule II substances have (1) a high potential for abuse; (2) a currently accepted medical use in the United States; and (3) the potential to lead to severe psychological or physical dependence if abused. 21 U.S.C. 812(b)(2).

21 U.S.C. 812(b) states that the Attorney General may move a substance from one schedule to another on finding that it meets the characteristics for the new schedule. "[e]xcept where control is required by United States obligations under an international treaty, convention, or protocol, in effect on the effective date of this part."

⁶See also *United States v. Gramlich*, *supra*, 551 F. 2d at 1364. Moreover, petitioner had an opportunity to seek administrative reclassification of marijuana under the procedure provided by 21 U.S.C. 811(a). He did not take advantage of this opportunity.

The United States' treaty obligations under the Single Convention on Narcotic Drugs,⁷ which requires signatories to control marijuana, also support the placement of marijuana on Schedule I. See *United States v. Rodriguez-Camacho, supra*. 21 U.S.C. 811(d) provides that if control of a substance is required by our obligations under such a convention, "the Attorney General shall issue an order controlling such drug under the schedule he deems most appropriate to carry out such obligations, *without regard to the findings required by subsection (a) of this section or section 812(b) of this title ****" (emphasis added). Cannabis and Cannabis resin are listed on Schedules I and IV of the Single Convention, which requires that its signatories limit production, distribution, and possession of these substances to authorized medical and scientific purposes, and also requires that signatories impose certain penal restrictions for violations of these limitations. To meet the requirements of the Single Convention, Cannabis cannot be classified lower than Schedule II of the Controlled Substances Act. See *National Organization for Reform of Marijuana Laws v. Drug Enforcement Administration*, 559 F. 2d 735, 739-740, 750-752 (C.A.D.C.).

2. If, as we contend, Congress properly may prohibit the commercial distribution of marijuana, then it necessarily follows that there is nothing to petitioner's objections to the penalty provisions that led to the sentence of ten years' imprisonment for distributing tons of that substance over extended periods.

⁷The Single Convention was opened for signature March 30, 1961. 18 U.S.T. 1407, T.I.A.S. No. 6298. The United States ratified the Convention in 1967.

Petitioner urges (Pet. 25-26) that prior decisions upholding the classification of marijuana, such as *United States v. Kiffer, supra*, were based in part on the fact that Congress distinguished between marijuana and other Schedule I drugs in the maximum penalty for unlawful distribution. He contends that, because Section 848 does not distinguish between marijuana and other Schedule I drugs, it violates the equal protection component of the Due Process Clause.

But the focus of Section 848 is the nature of the criminal enterprise, not the identity of the drug involved. That Section provides that persons engaged in a continuing criminal enterprise with five or more other persons committing felony violations of the Controlled Substances Act from which substantial profits are derived shall, on conviction, be sentenced to not less than ten years in prison, be fined as much as \$100,000 and be required to forfeit all profits obtained in that enterprise. Section 848 "is intended to serve as a strong deterrent to those who otherwise might wish to engage in the illicit traffic, while also providing a means for keeping those found guilty of violations out of circulation." H.R. Rep. No. 91-1444, *supra*, at 10.

Petitioner was the central figure of an organization distributing tons of marijuana throughout the United States. The organization met the criteria provided by the statute. Congress could properly use especially high penalties to deter those who make a continuing business of distributing enormous quantities of drugs that cannot lawfully be distributed in any quantities.⁸

⁸Congress followed the advice of the President's Advisory Commission on Narcotic and Drug Abuse (the Prettyman Commission), which recommended that "[t]he illegal traffic in drugs should be

Petitioner also urges (Pet. 14-21) that subjecting him to the same 10-year minimum sentence, with no possibility of parole, that would have applied if his organization had sold heroin is cruel and unusual punishment.⁹ But the sentence imposed here is neither barbaric nor excessive in relation to petitioner's long-term flouting of the laws. A punishment is excessive in the constitutional sense only if it "(1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime." *Coker v. Georgia*, No. 75-5444, decided June 29, 1977, slip op. 7. Imposition of a stiff minimum penalty on those who engage in organized disregard for society's laws in exchange for substantial profits—whichever drug they receive the profit from—is not excessive under this standard.¹⁰

attacked with the full power of the Federal Government. The price for participation in this traffic should be prohibitive. It should be made too dangerous to be attractive." H.R. Rep. No. 91-1444, *supra*, at 9.

⁹Petitioner's related contention that the mandatory minimum sentence invades judicial or executive prerogatives is insubstantial. With the exception of the President's pardoning power (see *Schick v. Reed*, 419 U.S. 256), and subject to the limitation in the Eighth Amendment, the Constitution requires both courts and the Executive Branch to abide by sentencing ranges selected by Congress. Courts have sentencing discretion only within the legislatively-selected range, and the Executive Branch must carry out sentences that courts lawfully impose. See *Ex parte United States*, 242 U.S. 27.

¹⁰The state cases relied on by petitioner (Pet. 15) did not involve extensive commercial distribution and, in any event, were based on state constitutional provisions. Federal cases uniformly have sustained the constitutionality of Section 848. See, e.g., *United States v. Bergdoll*, 412 F. Supp. 1308 (D. Del.); cf. *United States v. Maiden*, 355 F. Supp. 743 (D. Conn.).

3. Finally, petitioner urges (Pet. 34-36) that the no-parole provision of Section 848 lapsed. The provision under which petitioner was sentenced (21 U.S.C. 848(c)) states:

In the case of any sentence imposed under this section, imposition or execution of such sentence shall not be suspended, probation shall not be granted, and section 4202 of Title 18 * * * shall not apply.

The Parole Commission and Reorganization Act, Pub. L. 94-233, 90 Stat. 219, revised Chapter 311 of Title 18 (which deals with parole) effective May 14, 1976. It moved the basic parole eligibility rules from Section 4202 to Section 4205; Section 4202 now deals with the creation of the Parole Commission. Section 848 has not been amended to refer to Section 4205.

The Parole Commission and Reorganization Act does not purport to repeal no-parole provisions of other laws. It is unfortunate that Congress did not revise statutory cross-references when changing the numbering of the sections in Chapter 311, but this oversight does not negate the intent of Congress clearly expressed in Section 848.¹¹ It has long been settled that recodifications and revisions of existing statutes do not repeal substantive provisions unless Congress unambiguously intended to do so. *Muniz v. Hoffman*, 422 U.S. 454, 467-474; *Aberdeen & Rockfish R.R. v. SCRAP*, 422 U.S. 289, 309 n. 12. There is no such intent here; to the contrary, Congress provided in 18

¹¹The House Report on the Controlled Substances Act made it clear that the reference in Section 848 to Section 4202 was intended to preclude persons convicted of conducting a continuing criminal enterprise from becoming eligible for parole. H.R. Rep. No. 91-1444, *supra*, at 50.

U.S.C. 4205(h) that the new statute does not alter existing no-parole provisions. See also *Frady v. Bureau of Prisons*, C.A. D.C., No. 77-1497, decided January 9, 1978.

In any event, under 1 U.S.C. 109, the general savings clause, a defendant's crime is subject to the punishment provisions in effect when he committed the offense, even if legislation reducing the penalty is enacted before his sentencing.¹² See *Warden v. Marrero*, 417 U.S. 653, 661. Petitioner's crime was committed before May 14, 1976, and the reference in Section 848 to Section 4202 must be construed as a reference to Section 4202 as it existed when petitioner committed his crime.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1978.

¹²Section 109 provides in relevant part:

The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute ***.